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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 763.

MAX HART,

Appellant,

vs.

B. F. KEITH VAUDEVILLE EXCHANGE; ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

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INDEX.

PAGE

Statement of Proceedings..... 1
Statement of Allegations Relied Upon..... 2, 7
Specifications of Error..... 7
Argument and Points..... 8
Definition of "Interstate Commerce"..... 8, 9
Extract from Baseball Decision and Comment Thereon 10, 11, 12
Description of "Vaudeville Act".....13, 14
Different Kinds of Vaudeville Acts.....15, 16
Use of Baseball Uniforms and Bats Distinguished from Use of Vaudeville Acts...17, 18
Decision of Lower Court Discussed..... 18
Distinction between Contract of Theatre with Public and with Owner of Vaudeville Act 22, 23

TABLE OF CASES.

PAGE

Federal Baseball Club v. National League, 259 U. S. 200 11

Harms v. Cohen, 279 Fed. Rep. 276 31

Hooper v. California, 155 U. S. 648 19

Marienelli v. United Booking Offices, 227 Fed. Rep. 167 ..... 23, 24

National League v. Federal Baseball Club, 269 Fed. Rep. 681 ..... 10, 24

Rankin v. Associated Bill-Posters, U. S. Rep. Jan. 2, 1923 28

United Leather Workers v. Herkert, 284 Fed. Rep. 449 9

United States v. Standard Oil, 221 U. S. 1 ... 21

IN THE

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MAX HART, Appellant, against B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., et al., Respondents.	October Term, 1922—No. 763.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

This is an appeal from a decree (Record, p. 30) made and entered on the 8th day of December, 1922, in the District Court of the United States for the Southern District of New York in the above entitled cause dismissing the complaint solely for want of jurisdiction by that Court of the subject-matter of the complaint (Record, p. 32).

The suit was filed on May 27, 1921, and came on to be heard on December 6, 1922, before the Honorable Julian W. Mack, Circuit Court Judge, holding District Court of the United States for the Southern District of New York.

The complaint was dismissed before the submission of any testimony.

Upon the dismissal of the complaint the Trial Court filed a certificate to the effect that the judgment of dismissal herein is based solely on the ground that the cause set forth in the declaration in his opinion is not one arising under the Anti-Trust Laws of the United States, and no other ground of jurisdiction appearing from the record in this case, that the case was dismissed for want of jurisdiction for the reason above stated (Record, p. 31).

Statement.

The complaint among other things alleges that:

Plaintiff was engaged in business in the City of New York, as the personal representative of, and had a large and substantial interest in many vaudeville acts (p. 8).

The defendants are corporations, and their officers, directors and associates engaged in booking, producing and exhibiting vaudeville acts, and in operating and controlling vaudeville theatres and collection agencies (pp. 1-7).

The business, trade and commerce of producing vaudeville was alleged to be conducted by six classes of persons, and consists of:

(a) Authors of vaudeville acts or productions.

(b) The producers of vaudeville acts and productions.

(c) Performers.

(d) Managers or personal representatives.

(e) Booking agents or agencies.

(f) Theatre proprietors.

(A) The authors of vaudeville acts or productions are persons who conceive and create the script and/or action and/or arrangement of the acts.

The acts when so created are usually copyrighted, and the authors are the owners of the property rights in the property so created by them, and when copyrighted, have the exclusive right to print, reprint, publish, copy and vend the copyrighted work; to perform or represent the copyrighted work published; to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcript or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever.

The authors of the acts next attempt either to produce the act themselves, or to contract for its production.

(B) The producers of vaudeville acts or productions consist of individuals, co-partners or corporations engaged in the business of organizing and building vaudeville acts, and the production involves the acquisition from the author of the rights to produce; the purchase of such costumes, scenery, mechanical and electric effects or whatever may be necessary to produce the acts, and generally the employment of performers, and, finally, the direction and rehearsal of the act, until it becomes the

production conceived by the author, and is ready for booking.

When the production is ready for booking, the producer's next step is to secure contracts for such acts, and practically all negotiations for such contracts not only contemplate, but if successful, result in the transportation of such acts from State to State, throughout a part, if not all of the States and Territories of the United States of America and Canada.

(C) The class of performers embraces actors, acrobats, athletes, musicians, singers, jugglers, conjurers and a great many other entertainers.

(D) The class of managers or personal representatives embrace those who are regularly engaged as the personal representatives and business managers of those embraced in the foregoing two classes.

(E) The class of booking agents or booking agencies, embraces those agencies which arrange for contracts between the proprietors of theatres and the owners of acts and/or performers.

(F) The class of proprietors embrace the owners, lessees and proprietors of theatres and playhouses who are engaged in presenting vaudeville entertainment for hire; this latter class contracts with those embraced in the first, second and third classes for completed production, usually through the agencies of those embraced in the fourth and fifth classes (pp. 7-8).

The defendants are alleged to have entered into and maintained an unlawful conspiracy and com-

bination to unduly restrict competition and to unduly obstruct the course of trade in said business with the purpose, motive and effect of securing the absolute monopoly of all of the high-class vaudeville business in each and all of the States of the United States of America, and in interstate commerce (p. 16).

The following were a few among the means adopted for carrying out the purpose of the combination and conspiracy:

(a) Agreeing among themselves, and with others, not to book any vaudeville acts nor permit any vaudeville act to be booked for any theatres, except through the agency of the defendants.

(b) Agreeing among themselves, and with others, not to book for any theatre who did not book exclusively through such defendants.

(c) Conspiring to compel and compelling all theatres in the United States not to book any act except through the agency of the defendants, and to blacklist and refuse to book any act which contracted through any other agency.

(d) By conspiring to force the theatre owners and act owners, respectively, to refrain from contracting with any theatre owner or act owner that was so blacklisted, under pains of being themselves blacklisted and debarred from doing business with or through the defendants, and by carrying out such conspiracy.

(e) By blacklisting all personal representatives of vaudeville acts, owners of vaudeville acts, and

owners of vaudeville theatres who fail to comply with their rules and regulations which in turn prohibited all persons engaged in such business from contracting through any other agency than said defendants or with any person who contracts through any other agency, and preventing all persons so blacklisted from contracting in said business.

(f) By agreeing to exact and exacting unconscionable tributes from all classes of persons engaged in such business as a condition precedent to their right to engage in or remain in said business (pp. 17, 18-25).

(g) A personal representative of vaudeville acts was permitted to do business with defendants only at the will of the defendants upon receiving what was designated in the business of the defendants as a franchise, which was given and revoked by the defendants at their own will (p. 17).

That as a result of such combination and conspiracy, they have acquired control and dominate practically all of the theatres in the United States and Dominion of Canada at which high-class vaudeville entertainments are produced (p. 8).

That no high-class performer or act who was debarred from doing business through the defendants could obtain sufficient employment in vaudeville in the United States and Dominion of Canada in theatres in which high-class vaudeville was produced from which to earn a living (pp. 8-9).

Plaintiff had developed a lucrative and profitable business and represented a great number of vaudeville acts in addition to his own, and his business

was growing, when in November, 1920, defendants revoked his franchise and refused to permit him to further do business.

Now, as a result of the defendants' unlawful acts, plaintiff is disabled from competing in the market, and his business is restricted and unprofitable, and is rapidly being destroyed (p. 26).

Specifications of Error.

1. The Court erred in sustaining the motion of defendants to dismiss the complaint.

2. The Court erred in dismissing the complaint.

3. The Court erred in dismissing plaintiff's complaint upon the ground that it did not have jurisdiction of the subject-matter of the complaint under any law regulating commerce among the States, and that no other ground of jurisdiction appears in said complaint.

4. The Court erred in holding that it was without jurisdiction or power to entertain the suit, and in dismissing the complaint herein.

BRIEF OF ARGUMENT.

POINT I.

The Court erred in decreeing that it was without jurisdiction to hear and determine this suit.

The issue involved in this appeal is sharply defined and involves but one question.

The Trial Court held that the complaint in this case did not show a combination or conspiracy in restraint of interstate trade or commerce, and it being conceded that there was no such diversity of citizenship as would confer jurisdiction upon the Court, and no other ground of jurisdiction of the parties or subject-matter of the suit appearing in the record, that it had no power to hear and determine this cause of action.

It cannot be questioned that the complaint alleges acts on the part of the defendants of such character as to restrain, control and monopolize the entire vaudeville business, nor that many of the transactions involved in such business are interstate in character.

It therefore follows that the sole question involved in this appeal is whether the business activities so restrained, or any of them, comes within the definition of "trade" or "commerce."

The Federal Courts have often defined interstate trade and commerce. An excellent resumé of these decisions may be found in the opinion of Mr. Justice Sanborn, who, in *United Leather Workers In-*

ternational Union v. *Herkert & Meisel Trunk Co.*, 284 Fed. Rep., at page 449, says:

> "Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfill his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 246, 20 Sup. Ct., 96, 109 (44 L. ed. 136).
>
> Indeed, the established rule is that 'interstate commerce,' within the meaning of that term in the Constitution and the Anti-Trust Act, embraces more than the mere sale, exchange and interstate transportation of the goods. It includes intercourse, it comprehends every contract, trade and dealing between citizens of one state and those of another which contemplates the transportation of goods, persons, or information from one state into another, and every initiatory, negotiating and intervening act of the parties to that trade or deal from the time the intercourse relating to it commences until the transportation and delivery have been completed. Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed., 1, 17, 84 C. C. A. 167; International Text-Book Co. v. Pigg, 217 U. S. 91, 107, 30 Sup. Ct. 481, 54 L. ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct., 106, 108, 66 L. ed. —; United States v. Reading Co., 226 U. S. 324, 367, 368, 33 Sup. Ct. 90, 57 L. ed. 243; Hopkins v. United States, 171 U. S. 578, 598, 19 Sup. Ct., 40, 43 L. ed. 290;

United States v. Swift & Co. (C. C.), 122 Fed. 529, 631; Welton v. State of Missouri, 91 U. S. 275, 23 L. ed. 347; Caldwell v. North Carolina, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. ed. 336; United States v. Tucker (D. C.), 188 Fed. 741, 742; Marienelli v. United Booking Offices of America (D. C.), 227 Fed. 165; In re Selman Heating & Plumbing Co. (D. C.), 204 Fed. 839, 840, 841-843; Robbins v. Shelby Taxing District, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. ed. 694; Globe Elevator Co. v. Andrew (C. C.), 144 Fed. 881, 882."

In *National League* v. *Federal Baseball Club*, 269 Fed. Rep. 681, the Court of Appeals of the District of Columbia uses the following formula:

"'The word "trade" in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally.' May v. Sloan, 101 U. S. 231, 237. It means 'the buying as well as the selling of property.' United States v. United States Steel Corporation et al., 223 Fed. 55, 177. Webster's Dictionary defines trade as 'the act or business of exchanging commodities by barter; the business of buying and selling for money; commerce, traffic; barter;' and says that 'commerce, in its simplest signification, means exchange of goods, * * *.' It may be said to be trade, traffic or exchange between different places and communities. And, according to the Century Dictionary, commerce is defined as 'interchange of goods, merchandise, or property of any kind; trade; traffic.' 'Commerce, briefly stated, is the sale or exchange of commodities.' United States v. Swift & Co., 122 Fed. 529. Substantially the same definitions are given in the case of United States v. E. C. Knight Co., 156 U.

S. 1; Gibbons v. Ogden, 9 Wheat. 1, 189, 190; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; In re Charge to Grand Jury, 151 Fed. 834.

Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another. The concomitant of this concept is the principle approved by the Supreme Court of the United States, that 'importation into one State from another is the indispensable element, the test, of interstate commerce.' International Textbook Co. v. Pigg, 217 U. S. 91."

The defendants, however, rely upon the case of *Federal Baseball Club of Baltimore* v. *National League,* decided by the Supreme Court of the United States on May 29, 1922, which they contend distinguishes the business activities of this case from those referred to in the above formulae.

Mr. Justice Holmes, speaking for the Court in that case, said:

"The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give exhibitions, the Leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business. According to the distinction insisted upon in Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, the transport is a mere

> incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which, in its consummation, is not commerce, does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustration given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state.
>
> If we are right, the plaintiff's business is to be described in the same way; and the restrictions by contract that prevented the plaintiff from getting players to break their bargains, and the other conduct charged against the defendants were not an interference with commerce among the states."

We contend, however, that this case simply reannounces the fixed rule that interstate trade or commerce must involve transactions or negotiations contemplating and/or resulting in the transfer, across State lines of some commodity, *i. e.*, a product of "human effort," or such as *directly* affect the transfer of persons, property or intelligence, across State lines, and that it further points out that transactions with reference to "personal effort" not related to production is not "trade" or "commerce," and that therefore baseball exhibitions, though given in different States, while undoubtedly they cause or result in the transportation of free persons across State lines, do not become

"trade" or "commerce" because of such transfer. In other words, a baseball exhibition is not a commodity—it is not an article of trade or convenience; it is not something that is bought and sold; it is not an element of economic wealth, nor is it composed of commodities; nor does a baseball exhibition produce anything that can be bought or sold; it does not result in any product that can be exchanged or traded in.

So, for the purpose of this argument only, we might even concede that the business of giving theatrical exhibitions in vaudeville theatres may not be commerce, just as we might concede that the business of giving exhibitions of motion pictures by means of films in motion picture theatres may not be "trade" or "commerce," or that the music rendered in any theatre by means of phonographic records or by piano played rolls, or other devices, may not be "trade" or "commerce," but we most emphatically insist that the *supplying* or *contracting* for the transfer across State lines of phonographic records, piano player rolls or other devices for operating automatic players, and for motion picture films for use in motion picture theatres, and for vaudeville acts for use in vaudeville theatres, is interstate commerce.

For, a vaudeville act or production, as defined by this complaint, is essentially *a product* of human labor; it is a *commodity* in which the property rights of the owners are recognized and protected by law. It is a commodity that is bought and sold, licensed and rented for hire; it is an element of economic wealth; it is property.

Let us see what a vaudeville act is:

(a) It is generally the work of an author or creator; his property rights in the act are protected by the copyright laws of the United States.

(b) Next, the producer, after acquiring the right from the author to do so, proceeds to build and equip the act by purchasing or manufacturing the necessary costumes, scenery, mechanical and electrical effects, and other properties required.

He also engages artists, stage directors, electricians, and whatever other persons are necessary for the production, and rehearses them in connection with the properties of the act, and all of these things together, that is to say, the work of the author, the scenery, costumes, mechanical, electrical or other properties necessary to produce the act, together with the actors, electricians and mechanics required for its production, working together, constitute the act.

It is an entity—the act is not complete if any of these elements are missing—and it is as such entity that it is booked, bought, sold or otherwise contracted for.

The complaint expressly alleges that—

> "Such acts are generally booked in New York, and contracts contemplate and result in the transportation of the act, which, of course, includes the persons, performers, scenery, music, costumes, and whatever constitutes the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said business has grown to such pro-

> portions, that there is a contant stream of commerce in and among the States, and from State to State, and through the various territories of the United States, in said business.
>
> The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases the use of large quantities of accessories, and special transportation equipment and facilities."

It is true that a contract booking an act often involves the services of various persons, and to that extent may be said to be a contract involving "personal effort," but it is also unquestionably true that it is something more than this, and that it involves, as well, the other elements which constitute the act, namely, the scenery, costumes and mechanical appliances, and everything necessary to constitute the entire act, as well as the right legally to use all of these things together.

The actors engaged in a copyright act, in which special costumes, properties, electrical equipments and scenery are involved, are obviously not the act, nor could they produce the act without the equipment necessary for its production, and even if they had these, they could not legally produce it without the authority of the owner of the copyright.

Of course, the presence of the artists or performers required in the production of an act is an essential element of the contract, and without them the act could not be produced according to the contract. It is equally clear, however, that the properties necessary for the production of the act, which in many cases consist of large quantities of accessories for the transportation of which special transportation equipment and facilities are required, are

also essential elements of the contract, and that the act could not be produced without them.

A contract made in New York booking an act for appearance in other States, provides, in effect, that the owner of the act will cause all of the persons and all of the properties which were exhibited by him in New York to be transported from New York to such other State, and that after their arrival at such other State they will be utilized for the purposes agreed upon.

It follows, therefore, that a booking contract made in New York, for a particular act, which consists in part of costumes, scenery, mechanical, electrical or other equipment, elephants, lions, seals, horses, dogs or other animals, for theatres in Cleveland, St. Louis and San Francisco, is a contract involving the transportation of that property in interstate commerce, just as fully as a contract for the delivery of the costumes or scenery involved in such acts, or of chairs to be used in such theatres, would be.

Although the complaint alleges that vaudeville acts generally consist of properties, scenery, costumes and other products of labor, as well as artists and others employed in the production, it is a matter of common knowledge that some vaudeville acts require the use of comparatively few properties. Among these are monologue and other acts of like character. Such an act obviously comes more nearly within the principle of the baseball decision than any other.

Contracts for such acts, in their consummation, involve personal effort, and to the least degree of any, the transportation of commodities, but even these generally require the use of specially made costumes, make-up and some properties, and in most

cases, the copyrighted work of an author, and they are contracted to be produced in identically the same manner as when exhibited for contract. In other words, it is the act that is contracted for, and is transported from State to State.

On the other hand, a great many acts consist of elaborate appliances, mechanical and electrical, as well as special stage settings; and/or animals, such as Powers' Elephants, Woodwards' Seals, Barnolds' Dogs, "Old Ninety and Nine" or "The Toonerville Trolley." The two last mentioned include the engine on the one hand, and the trolley car and tracks on the other, as well as movable platforms, shifting panoramic scenery and what not.

In many of these acts the human element is shifted at will, and it is the mechanical device which constitutes the act.

Take, for instance, the act known as "Sawing a Woman in Two," the most essential element of this act is the paraphernalia and stage settings required to produce the illusion. Without this paraphernalia, the act obviously is not complete, and could not be produced at all, and the owner of this act may well have five, six or a dozen of his acts produced simultaneously throughout the United States employing the personal element required locally, or as he may find convenient.

Defendants will doubtlessly contend that the persons engaged in giving exhibitions of baseball employ uniforms to distinguish them from one another, and that in playing the game they use bats and balls and other paraphernalia which they may and frequently do transport from State to State, but it was not claimed in the baseball case that the defendants unduly control or restrain the traffic in uniforms or balls or bats, or any other product

of human labor. No person engaged in the manufacture of uniforms, of balls, bats or of any other product of human labor has complained of any misconduct on the part of the baseball club with respect to trade in such commodities. The business which they are charged with having monopolized is the business of giving baseball exhibitions, and that business is one which obviously and essentially consists of a series of contests.

The plaintiff in that case was another organization engaged in the same character of business.

It is true the plaintiff complained of alleged misconduct of the defendants in that case and charged them with having monopolized or having secured a monopoly of the business, but it was not even contended that the defendants prevented plaintiff from freely securing every character of commodity required by plaintiff in its business.

What was complained of was that the defendants had monopolized the supply of ball players; in other words, that they had obtained exclusive contracts for the services of players in baseball exhibitions, but such services were obviously unrelated to production of any kind.

Clearly, there was no *restraint of interstate trade* in that case, although defendants doubtlessly, in the conduct of their business, caused persons and property to be transported across State lines.

In this case the defendants are restraining the entire business of dealing in and of contracting for vaudeville acts, and the people complaining are in the business of manufacturing and owning such acts, and of contracting for such acts in interstate commerce, and are directly injured by the restraint of trade in the very commodity in which they are dealing.

The defendants, however, contend, and the Court below adopted their view, that in order that a transaction may be interstate commerce, "the dominant object of the parties in respect to the matter complained of must affect or be interstate commerce," and the Court further held, in effect, that since the dominant object of the defendants was to procure materials for use in intrastate vaudeville exhibitions, and inferentially, that intrastate or local vaudeville exhibitions were not trade or commerce, that procuring such material could not be interstate commerce.

The holding of the lower Court was the result of that Court's effort to distinguish those decisions which hold that every transaction *of trade or commerce* which contemplates and results in the transportation of persons, property or intelligence across State lines is interstate commerce, from those which hold that business activities which do not come within the definition of trade or commerce do not become interstate trade or commerce, because incidentally they may result in, cause or become the occasion for the transportation across State lines of persons, intelligence or property.

This Court has held in a great number of cases, of which *Hooper* v. *California*, 155 U. S. 648, is usually cited, that certain negotiations or business transactions, such as the execution of a contract for insurance or the giving of a baseball exhibition, do not come within the definition of "trade" or "commerce," and the Court has also held that since an insurance contract is not "trade" or "commerce," the act of a broker in negotiating such a contract and procuring the delivery of the policy by interstate agencies does not transform the contract into interstate commerce, and since the business of giv-

ing baseball exhibitions is not "commerce," it does not become interstate commerce, because it incidentally results in causing free persons to go from State to State.

In the first instance, they hold that the insurance policy is nothing more than the evidence of a contract, and is not property that is being dealt in, and in the second, they hold expressly, that the business of giving exhibitions of baseball is purely local, and does not constitute "trade," and that the transportation of the players does not change the nature of the business.

In none of these cases do the contracts themselves or the combinations or conspiracies complained of, restrict or restrain the free traffic in any commodity.

Our position is simply this:

The Anti-Trust Laws *forbid every combination, conspiracy, etc., in restraint of interstate commerce or trade.*

If the business activity of the defendants does not come within the definition of trade or commerce, and if they have entered into no combination, contract or conspiracy that restrains interstate trade or commerce, obviously these laws cannot apply.

But, since we have shown that they have entered into contracts, combinations and conspiracies, the purpose and result of which has been to unduly restrain, control and monopolize the entire market for vaudeville acts, and to restrict and restrain the traffic in such acts, we most emphatically insist that any other purpose or object that they might have had is wholly immaterial.

This Court, moreover, has held in no unequivocal terms, that every restraint of trade that is direct and is undue, falls within the prohibition of the statute.

Without multiplying the authorities on this subject, we will content ourselves by quoting from the *Standard Oil* case, 221 U. S., page 1, in which the Court says:

> "To fall within the prohibitions of the statute it is necessary that the unlawful restraint of trade—and this is not always the same thing as the mere restraint of competition—should be direct, and not merely incidental, and should also be undue and unreasonable. If it be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief. There are many methods by which trade may be unduly restrained, and among these are contracts or combinations to fix and maintain prices or to boycott the goods of a manufacturer or other dealer. U. S. v. Keystone Watch Case Co. (E. D. Pa. 1915), 218 Fed. 502, wherein the Court held that the action of a corporation manufacturer of watch cases in selling goods exclusively to selected jobbers who complied with their request to sell at a fixed price and in effect forbidding such jobbers to deal in watch cases made by other manufacturers, was an unlawful restraint of trade."

Testing the case at bar by this rule, we find the following facts to be undisputed:

Defendants are engaged in the business of acting as middlemen between the owners of vaudeville acts and the owners of vaudeville theatres.

Their sole function, in booking acts, is to procure material for the theatres and negotiate contracts with the owners of the act for the hire of their acts. For their service they charge fees to the owners of the theatres and also to the owners of the act.

The contract necessarily contemplates and results in the transportation of the act from State to State continuously.

It may be conceded that after a vaudeville act arrives in a State it is engaged in purely intrastate transaction, but we again insist that, since the *act* consists of property, and since the contract expressly or necessarily contemplates and results in the transportation of that property from State to State, that the transaction is an ordinary transtion of interstate trade, and that the fact that after the act arrives within the State it may be utilized for purposes that are purely intrastate or for purposes which do not themselves constitute "trade" or "commerce"—if it be used for charity, pleasure or for entertainment—that that does not in the slightest degree change the nature of the transaction by which it was induced to go from one State to another.

We do not wish to be understod as conceding that the business engaged in by the owner of a vaudeville theatre is not trade or commerce.

We have not discussed that question because we do not believe that it is involved in this appeal.

But we desire in this connection to call attention to the very clear distinction between the contractual relations of the owner of a vaudeville theatre with the public and those which he has with the owner of a vaudeville act.

In the first place, the patrons who attend his theatre receive nothing except amusement and entertainment.

In the second place, however, the owner of a business operated solely for gain contracts with the owner of property for the use of that property in his business enterprise.

The owner of the theatre pays for the property and/or for the rights to use it and utilizes it in the regular course and conduct of his business for profit.

It certainly cannot be said of him that he does not receive and use property.

In the operation of his theatre he requires many such products of labor such as chairs, tickets, scenery, vaudeville acts, films and advertising matter.

All of these things are commodities which he purchases in the market and all of them are used by him in the operation of his business.

A very similar state of facts was discussed in the case of *Marienelli* v. *United Booking Offices*, 227 Fed. Rep., page 167.

In that case, in which the activities of these same defendants was being discussed, Judge Learned Hand says:

> "The combination or conspiracy is alleged to be in restraint of the defendants' business, and the first inquiry must be of the nature of the business. Undeniably certain aspects of the business are interstate commerce, as, for instance, the contracts made by the booking companies under which the performers must go from state to state, throughout the circuit, acting here and there, and fulfilling their contracts as much

> by the travel as by the acting. Since Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913 E, 905, and Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728, it cannot be doubted that this feature of the business was within the complete powers of Congress, for such purposes as it might find to the public interest. This, moreover, applies as well to that feature, incidental to the foregoing, which consists in the carriage of the performers' stage properties and paraphernalia from one state to another, a necessary part of the performance of their contracts with the defendants. The Lottery Cases, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. The same may be said of the scenery and advertising matter sent from state to state by the theatres themselves. In respect of all these details the business, therefore, consists of interstate commerce."

This case was cited by the Court of Appeals of the District of Columbia in *The National League of Professional Baseball Clubs* v. *The Federal Baseball Club of Baltimore*, 48 Wash. Law Rep., at page 821:

> "Much stress is laid by the appellee upon Marienelli v. United Booking Offices, 227 Fed. 165, and International Textbook Co. v. Pigg, ante, but we think they are not in point. In the first case the combination was between a series of theatres and persons engaged in theatrical brokerage, according to which the brokers had the exclusive right of acting for the theatres in booking performances on an interstate schedule. The entire business consisted in the negotiation of a contract to travel and perform. The brokers

were not interested in the service rendered or the skill exhibited by the performers. The Court stressed this feature and distinguished the case before him from the Hammerstein case, ante, by saying that the trade and commerce element in the case he was considering was essential, while that element in the Hammerstein case was but incidental. For the same reason the Marienelli case is distinguishable from the case before us."

The complaint in this case, moreover, differs from the complaint in the *Marienelli* case in this—that it defines *the vaudeville act* to be the commodity which is being traded in, and we contend that the business consists of something more than "a contract to travel and perform." It consists of negotiations for the transportation of property from State to State, as well as the use of the property upon its arrival.

The complaint, after alleging that the act is first the work of an author or creator, and next of a producer who manufactures or purchases the properties required for the act and produces it, expressly alleges:

> "As a further part of the aforesaid business, trade and commerce, said theatre proprietors enter into contracts with the producers and owners of vaudeville acts wherein and whereby such acts are contracted for to appear at said proprietor's theatres. Said contracts are known as and referred to as 'booking contracts.'
>
> Such acts are generally booked in New York, and the contracts contemplate and result in the transportation of the acts, which, of course, include the performers, scenery, music, costumes, and whatever constitutes

> the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said business has grown to such proportions, that there is a constant stream of commerce in and among the States and from State to State, and through the various Territories of the United States, in said business.
>
> The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases the use of large quantities of accessories, and special transportation equipment and facilities" (p. 8).

So it is quite evident that it is *the act* that is contracted for, and not the performers.

In carrying out his contract, the owner of the act, which may be a corporation, partnership or individual, and may never have been a performer, must cause *the act* to be transported from State to State, and upon its arrival comply with the conditions of the agreement.

It is more than a mere agreement to travel and perform—it is an agreement to transport property, as well as persons, and to cause an entity controlled by the owner to function in accordance with the terms of the contract, for which the owner receives payment, and the owner of the theatre receives the use of the owner's property, in a business conducted by him for gain.

It may be contended that a contract booking a vaudeville act includes the producing of the act when it arrives at its destination, and that after it arrives the completion of the booking contract involves only personal effort unrelated to production. This, however, is not true, because it also involves

the other elements constituting the act which we have shown constitutes and is property.

It may further be contended that since the contract involves in part elements which are purely intrastate or which may fall outside of the definition of trade or commerce, that the entire transaction even in so far as it directly involves interstate commerce is relieved from the effect of the statute.

But if such disguises as these can effect this result, it must follow that every transaction in interstate commerce except such as directly provide for the transportation of commodities, persons or intelligence from State to State must be similarly affected.

Almost every consignment of merchandise across State lines contemplates the ultimate use of such merchandise in purely intrastate transactions.

Billboard advertising, after the posters arrive, is purely local in its nature, and after it is posted, though it obviously affects trade, is not itself trade or commerce, and this is doubly true of such posters as advertise baseball exhibitions and possibly theatrical productions.

Harvesting machines, motion picture films, photographic cameras and other commodities, when shipped from State to State under contracts providing for their use locally, would fall within such a rule, particularly if an operator was sent along to operate and control the machine.

As we have said before, it seems too obvious for discussion that the use to which an article of commerce is put after its arrival at its destination cannot affect the character of the transaction which resulted in its transfer across State lines.

If the contract itself directly involves, that is to say, if it contemplates and results in the transportation of property from one State to another, it is a contract affecting interstate commerce.

This Court in a very recent case—*Rankin* v. *Associated Bill-Posters,* decided January 2, 1923—has discussed this very question:

> "The court below held: 'the business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by the billposters is a purely local service not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'
>
> We cannot accept this view. The alleged combination is nation-wide; members of the association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states, and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. Hopkins v. United States is not applicable. There the holding was that the rules, regulations and practices of the association direct affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in

posters to channels dictated by the confederates to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding non-competitive prices. The allegations clearly show the result has been as designed—that the statute has been violated and plaintiff's business has suffered.

This Court has heretofore laid down and adequately discussed the applicable principles. W. W. Montague & Co. v. Lowry, 193 U. S. 38, 45, 46, 48 L. ed. 608, 611, 612, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 293, et seq. 52 L. ed. 488, 496, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815, Gompers v. Buck's Stove & Range Co., 211 U. S. 418, 438, 55 L. ed. 797, 804, 34 L. R. A. (N. S.) 874, 31 Sup. Ct. Rep. 492; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 609, 58 L. ed. 1490, 1498, L. R. A. 1915 A, 788, 34 Sup. Ct. Rep. 951. See also United States v. Associated Bill Posters, 235 Fed. 540. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopoly and combinations in restraint of trade. The alleged actions of defendants are directly opposed to this beneficient purpose and are denounced by the statute."

The analogy of the case at bar to that case is complete.

The alleged combination is nation-wide. The defendant and others are bound by an agreement and forced by threats to pursue a certain course of business designed and adequate to interfere

with the free flow of commerce among the States and with Canada.

As a direct result of defendants' joint acts, plaintiff's business has been greatly limited or destroyed.

The purpose of the combination here challenged is to destroy competition and to secure a monopoly by limiting and restricting, among other things, commerce in vaudeville acts to channels dictated by defendants and their confederates, and to exclude from such trade the undesired, including the plaintiff, and to enrich its members by exacting unconscienable tributes, and by controlling and regulating prices.

The allegations clearly show the result has been as designed, and that the statute has been violated, and that plaintiff's business has suffered. Plaintiff is shown to be engaged in the business of owning vaudeville acts which have been excluded from booking; he is further shown to have been engaged in the business of representing large numbers of vaudeville acts in interstate commerce, and they are shown to have been excluded from obtaining business unless they severed their connection with the plaintiff.

Since a vaudeville act is shown to be a commodity, or property, the restraint alleged is clearly direct and undue.

Although we most emphatically dissent from the proposition that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce in order to bring their acts within the prohibition of the statute, and insist that the true rule is that every combination or conspiracy which directly and un-

duly restrains trade is prohibited, no matter what the dominant object of the parties to the conspiracy may be, we nevertheless insist that in this case it was obviously the dominant object of these defendants and their confederates to control these markets and restrain and restrict this trade, so that they might absolutely dominate and control it, and that they have by unlawful means effectually accomplished that object.

Upon the trial, the defendants cited the case of *Harms* v. *Cohen*, 279 Fed. Rep., page 276, as authority for the proposition that a combination of composers, authors and publishers to demand extortionate license fees for profit of musical numbers copyrighted by the various members, did not constitute a violation of the Sherman Act.

In that case, the Court, after discussing whether the giving of a performance of a musical composition was "trade" or "commerce" any more than producing plays, grand opera, or the giving of baseball exhibitions were, cited *People* v. *Klaw*, 106 N. Y. Supp. 341; *Metropolitan* v. *Hammerstein*, 162 App. Div. 691; *National League* v. *Federal Baseball Club*, 269 Fed. Rep. 681, and continued as follows:

> "The material object, the sheets of music, are not involved. If, therefore, the material object is not involved, so far as the defendant is concerned, the answer does not show that *interstate commerce* is directly affected by the combination, and it is therefore no defense. Citing Hopkins v. United States, 171 U. S. 578; Blumenstock v. Curtis, 252 U. S. 436." (Italics ours.)

But, in this case, *the vaudeville act* does consist of material objects—of tangible things, and the traffic in these material objects and tangible things is restrained by the combination and conspiracy of these defendants.

It is true that the contract for the vaudeville act requires the use of these material things after they are transported, in connection with certain intangible property rights, and the efforts of the performers in the giving of an exhibition. But, as heretofore shown, the act consists of all these things, and all of these things—and some of them separately—constitute property.

A motion picture film, the use of which is contracted for by a motion picture theatre, occupies the same position as does a vaudeville act. It is a product of human labor—it is property—it is contracted for in interstate commerce, but it is used by the owner of the motion picture theatre for projection on a screen in giving the exhibition.

Baseball uniforms, bats and balls are commodities which are required for and used in the giving of baseball exhibitions. They are all products of human labor—tangible, material things.

It has been held that in giving a baseball exhibition it is not "trade" or "commerce," and that a combination of clubs for the purpose of monopolizing that business is not a violation of the statute.

But, if a combination of baseball clubs engaged in the business of giving exhibitions unlawfully conspired with one another to restrain the interstate traffic in baseball bats, uniforms or baseballs generally, no one would say that such combination was not in violation of the anti-trust laws.

POINT II.

The decree and judgment of the lower Court should be reversed and the case remanded.

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